

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES MCKINLEY SEBERRY,

Defendant-Appellant.

UNPUBLISHED

November 13, 2014

No. 317838

Wayne Circuit Court

LC No. 12-006706-FC

Before: WHITBECK, P.J., and FITZGERALD and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to 19 months' to 10 years' imprisonment for each of the assault with intent to do great bodily harm less than murder convictions, two years' imprisonment for the felony-firearm conviction, and 45 days in jail for the felon in possession of a firearm conviction. We affirm.

On June 10, 2012, defendant shot off various fireworks at his home in Detroit, in the direction of his neighbor, Lillian Newman's, home. Several Newman women came outside and asked defendant to stop shooting the fireworks. He did not stop. A great deal of unruliness, and an argument, ensued. Defendant and one eyewitness testified that Telecia Newman began to beat defendant's car with a stick, cracking his windshield. Defendant testified that Telecia's cousin, Romell Smith, was also involved in the argument and pulled a nine millimeter gun on him. Defendant then immediately went into his home and retrieved a shotgun. Testimony varied as to how many shots defendant fired, but it was undisputed that defendant fired the shotgun in Smith's direction. However, Jasmine Newman was hit twice, once on her back and once on her arm, while Lillian Newman was shot in the right foot. Neither party suffered serious injuries, in part due to the fact that the gun was loaded with bird shot, which resembles a BB pellet.

Defendant argues there was insufficient evidence upon which to convict him of assault with intent to do great bodily harm less than murder. Defendant argues that a rational trier of fact could not conclude beyond a reasonable doubt that he had the requisite intent for these crimes. Specifically, defendant argues that because there was a significant distance between those harmed by the shooting and defendant's location at the time of the shooting, and defendant

used birdshot in the shotgun instead of a more dangerous projectile, defendant did not intend to do great bodily harm. He argues that the assault he was guilty of was, instead, felonious assault.

This Court employs de novo review for challenges to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). This Court reviews the evidence in the light most favorable to the prosecution. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). If a rational tier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt, then the conviction must be sustained. *People v Cain*, 238 Mich App 95, 117; 605 NW2d 28 (1999).

The elements of assault with intent to do great bodily harm less than murder are (1) “an attempt or offer with force and violence to do corporal hurt to another” and (2) “a specific intent to do great bodily harm less than murder.” *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996) (citation and internal quotation marks omitted), amended 453 Mich 1204 (1996). A defendant intends to do great bodily harm when the injury intended could seriously harm the health or function of the body. See *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005).

The issue to decide on appeal is whether there was sufficient evidence to prove beyond a reasonable doubt that defendant possessed the requisite intent to support his convictions. Defendant argues that because he stood at a “significant distance” from the victims when shooting the gun and because his gun was loaded with birdshot, a less powerful type of ammunition, he did not intend great bodily harm. This argument is unpersuasive for three reasons. First, defendant admitted at trial that he shot the gun in order to “hurt” Smith. As the trial court noted, his intent to harm Smith transferred to Jasmine and Lillian. The prosecution must prove only that defendant had the intent to do great bodily harm to someone, without regard to whether that person is the person who was ultimately injured. *People v Lawton*, 196 Mich App 341, 350-351; 492 NW2d 810 (1992).

Furthermore, this Court considers the act itself and the means employed as evidence of intent to do great bodily harm. See *People v Flowers*, 191 Mich App 169, 178-179; 477 NW2d 473 (1991); see also *People v Cunningham*, 21 Mich App 381, 384; 175 NW2d 781 (1970). Use of a dangerous or deadly weapon indicates intent to do great bodily harm. *People v Jassino*, 100 Mich 536, 538; 59 NW 230 (1894). It is undisputed that defendant shot a shotgun toward a group of individuals in order to harm Smith.

Second, defendant’s intent to do great bodily harm is not negated by the distance from which he shot the gun. In *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992), we upheld a conviction for assault with intent to do great bodily harm less than murder where a defendant fired a gun at a victim from 60 feet away. Here, defendant testified that he was merely 15 to 20 feet away from Smith when he shot at him, although the fact-finder indicated that defendant was likely closer to 60 feet away. Additionally, defendant advanced as he shot the gun. The evidence also suggested that defendant shot the gun multiple times, as Detroit Police Officer Jason Marshall testified that he found shotgun shells in the street and on defendant’s front porch. All of the prosecution’s witnesses agreed that defendant shot multiple times, although the exact number of shots could not be ascertained. Photos of the damage from the pellets to the siding on Lillian’s home also indicated multiple shots. Considered together, the

evidence suggests that defendant began shooting from his porch, and continued to shoot as he advanced across Harold Street, which supports the fact-finder's conclusion that he intended great bodily harm.

Third, although defendant's use of birdshot as ammunition does support his argument to a degree, particularly in light of the fact that police recovered other, more powerful ammunition from defendant's home, it does not alone exclude a rational finder of fact from determining that defendant intended great bodily harm. Although not as powerful as standard ammunition, birdshot certainly could cause a serious physical injury to the health or function of the body. The fact-finder was free to assess the weight of defendant's use of birdshot. It determined that even in spite of the use of birdshot instead of more powerful ammunition, defendant intended to cause great bodily harm to Smith. When "considering proofs in a light most favorable to the prosecution," this Court must "avoid weighing the proofs" *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Conflicts in the evidence must be resolved in favor of the prosecution on appeal. *Id.*

In consideration of the entire record in the light most favorable to the prosecution, a rational trier of fact could find that sufficient evidence existed to conclude the elements of assault with intent to do great bodily harm less than murder were proven beyond a reasonable doubt.

Affirmed.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray